Tentative Rulings for December 12, 2013
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

13CECG02602 ***Johnson v. Martinez*** **(Dept. 403)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

13CECG00276 ***Huskey v. Coalinga State Hospital et al.*** **is continued to Tuesday, January 14, 2014 at 3:30 p.m. in Dept. 402.**

13CECG02491 ***Von Welrhof v. Torrence*** **is continued to Tuesday, December 17, 2013, at 3:30 p.m. in Dept. 403.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

2 **Tentative Ruling**

Re: ***Nevarez v. Foster farms LLC et al.***
Superior Court Case No. 13CECG02624

Hearing Date: December 12, 2013 (Dept. 402)

Motion: To strike order on re Disqualification

Tentative Ruling:

To grant plaintiff's motion to strike the disqualification of Judge Snauffer.

Explanation:

Defendants filed a CCP §170.6 challenge to judge Snauffer on October 31, 2013. The Court accepted this challenge as timely and disqualified Judge Snauffer on October 31, 2013. At this time the Court was unaware that the defendants had served a document demand on October 9, 2013. The declaration filed by defense counsel in support of the 170.6 challenge did not mention the discovery served. Although Judge Snauffer accepted the challenge, he did so without knowledge of all pertinent facts. An untimely challenge cannot succeed on a waiver theory. ***Briggs v. Superior Court*** (2001) 87 Cal. App. 4th 312, 318. The defendant made a general appearance on October 9, 2013. ***Mansour v. Superior Court*** (1995) 38 Cal. App. 4th 1750. ***Creed v. Schultz*** (1983) 148 Cal. App. 3d 733. The 170.6 challenge was untimely. Code of Civil Procedure §170.6 (a). The Court therefore strikes the disqualification as being untimely and entered in error. Having struck the disqualification this case will again be assigned to Judge Snauffer.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH (Judge's initials) on 12/11/2013 (Date).

03

Tentative Ruling

Re: ***California Specialty Printing, Inc. v. Stewart***
Case No. 13CECG02816

Hearing Date: December 12th, 2013 (Dept. 402)

Motion: Defendants' Demurrer to Complaint

Tentative Ruling:

To take the demurrer to the complaint off calendar. The demurrer is moot in light of the filing of the first amended complaint.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 12/11/2013.
(Judge's initials) (Date)

03 **Tentative Ruling**

Re: ***Manley v. The Garold C. Brown Family Limited Partnership***
Case No. 13CECG01735

Hearing Date: December 12th, 2013 (Dept. 402)

Motion: Defendant's Petition to Compel Arbitration

Tentative Ruling:

To grant the defendant's petition to compel arbitration. (Code Civ. Proc. § 1281.2.) To stay the civil action until resolution of the arbitration proceedings. (*Ibid*.)

Explanation:

Under Code of Civil Procedure section 1281.2,

> On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:
>
> (a) The right to compel arbitration has been waived by the petitioner; or
>
> (b) Grounds exist for the revocation of the agreement.
>
> (c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. (Code Civ. Proc., § 1281.2.)

There is a strong public policy in favor of arbitration, and all doubts as to whether a dispute is covered by an arbitration agreement must be resolved in favor of arbitration. (*Bono v. David* (2007) 147 Cal.App.4th 1055, 1062.)

"It seems clear that the burden must fall upon the party opposing arbitration to demonstrate that an arbitration clause cannot be interpreted to require arbitration of the dispute." (*Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 686–687.)

In order to meet its burden of showing the existence of an agreement to arbitrate, the moving party must only submit a copy of the agreement or set forth its provisions in the petition. (*Condee v. Longwood Management Corp*. (2001) 88 Cal.App.4th 215, 219.) The Rules of Court do not require the petitioner to introduce the agreement into evidence or provide the court with more than a copy of the agreement or a recitation of its terms. (*Ibid*.) "Petitioner need only allege the *existence* of an agreement and support the allegation as provided in rule 371." (*Ibid,* emphasis in original.)

Here, defendant has provided a copy of the alleged arbitration agreement as an attachment to the petition, and has provided declarations to verify the existence of

the agreement. (Brown decl., ¶¶ 6-9, and Exhibits A and B to the Petition.) Thus, defendant has met its burden of showing that an agreement to arbitrate exists between the parties.

Plaintiff argues in opposition[1] that defendant has no standing to enforce the arbitration agreement because it was not a party to the agreement. Plaintiff points out that the agreement is between himself and "Gary Brown Properties", not the defendant, The Garold C. Brown Family Limited Partnership, and thus defendant does not have standing to compel arbitration under the agreement. However, defendant alleges under penalty of perjury that "Gary Brown Properties" is just an informal name for The Garold C. Brown Family Limited Partnership, and that the Partnership is the actual legal entity under which defendant does business. (Brown decl. on Reply, ¶¶ 3, 4.)

Plaintiff does not present any evidence to dispute this fact. Thus, it appears that "Gary Brown Properties" has been used as an informal name for the Partnership, which was the plaintiff's actual employer and the other party to the arbitration agreement. Consequently, defendant has standing to enforce the arbitration agreement, and the court intends to find that there was an arbitration agreement between the parties.

Next, plaintiff has argued that the defendant waived its right to compel arbitration by failing to conduct informal negotiations to resolve the dispute, as required under the agreement. However, the ADR agreement specifically provides that, if the employee obtains a right to sue letter from the DFEH, "binding arbitration shall be the exclusive remedy." (Exhibit B to Petition, p. 7-4, last full paragraph.) Here, plaintiff obtained a right to sue letter before contacting defendant discuss an informal resolution of the dispute, so defendant was justified in refusing to engage in mediation.

Also, plaintiff argues that defendant's conduct during the litigation is inconsistent with asserting the right to arbitration, and therefore the court should find that defendant waived its right to compel arbitration. However, the court does not intend to find that there was a waiver of the right to compel arbitration here.

"State law, like the FAA, reflects a strong policy favoring arbitration agreements and requires close judicial scrutiny of waiver claims. Although a court may deny a petition to compel arbitration on the ground of waiver, waivers are not to be lightly inferred and the party seeking to establish a waiver bears a heavy burden of proof." (*Saint Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195, internal citations omitted.)

"Both state and federal law emphasize that no single test delineates the nature of the conduct that will constitute a waiver of arbitration. 'In the past, California courts have found a waiver of the right to demand arbitration in a variety of contexts, ranging

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[1] Defendant has objected to plaintiff's opposition on the grounds that it was not timely served, and thus the court should refuse to consider it. However, while the opposition was not served by means reasonably calculated to ensure delivery to defendant within one business day as required under Code of Civil Procedure section 1005(c), defendant was still able to file a timely and substantive reply, so the court will not penalize plaintiff for the late service by refusing to consider the opposition.

from situations in which the party seeking to compel arbitration has previously taken steps inconsistent with an intent to invoke arbitration [citations] to instances in which the petitioning party has unreasonably delayed in undertaking the procedure. [Citations.] The decisions likewise hold that the "bad faith" or "wilful misconduct" of a party may constitute a waiver and thus justify a refusal to compel arbitration. [Citations.]'" (*Id*. at 1195-96, internal citations omitted.)

"In determining waiver, a court can consider '(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether "the litigation machinery has been substantially invoked" and the parties "were well into preparation of a lawsuit" before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) "whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place"; and (6) whether the delay "affected, misled, or prejudiced" the opposing party.'" (*Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 992, internal citations omitted.)

Here, plaintiff points to the defendant's alleged refusal to engage in informal negotiations to resolve the dispute, which plaintiff contends is inconsistent with the express language of the arbitration clause. Also, plaintiff notes that defendant invited plaintiff to file the present complaint, served a general denial to the complaint that did not mention arbitration, served and responded to discovery without mentioning arbitration, paid jury fees, and agreed to a trial date without requesting arbitration. Defendant has also sought a pretrial discovery conference in anticipation of bringing a motion to compel discovery responses from plaintiff. Plaintiff also contends that defendant unreasonably delayed in seeking arbitration.

However, the case has only been on file since June of 2013, and defendant only filed its answer in July, about three months before bringing the present petition to compel arbitration. Thus, defendant has not engaged in an excessively long delay in seeking arbitration. There have been no substantive rulings on any dispositive motions during the time the case has been pending. While some discovery requests have been served and answered, simply engaging in basic discovery is not enough by itself to show a waiver of the right to arbitration. Nor has defendant actually brought a motion to compel discovery responses, much less obtained a court order compelling such responses.

In *Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, the court held that serving discovery requests that would have been allowable under AAA rules and "mere participation in litigation" did not constitute a waiver of the right to arbitrate, even though the opposing party incurred some costs and legal expenses during the litigation. (*Id*. at 1479.) The court also noted that the case had only been pending for about two months before the petition to compel arbitration was filed, and no substantive discovery responses had been served or formal hearings taken place on discovery issues. (*Ibid*.) Under these circumstances, the court found that the trial court did not err in impliedly rejecting the waiver argument. (*Ibid*.)

Likewise, here the facts only show that defendant participated in litigation for about three months before bringing its petition to compel arbitration, which is not enough to demonstrate a waiver. Some discovery has been exchanged, but plaintiff has not shown that any of the information obtained in discovery would not have been discoverable under AAA rules. Defendant has not brought any discovery motions or obtained orders on such motions. Similarly, the defendant's payment of jury fees and attendance at the case management conference was necessary to avoid a waiver of the right to a jury trial if the court denied the petition to compel arbitration, and shows "mere participation in litigation", not conduct inconsistent with arbitration.

Also, even assuming that defendant's conduct was inconsistent with seeking arbitration, plaintiff has failed to show that he was misled, affected or prejudiced by the delay in defendant's request to arbitrate. (*Sobremonte v. Superior Court, supra*, 61 Cal.App.4th at 992.) "A party seeking to prove waiver of a right to arbitration must demonstrate: (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts." (*Fisher v. A.G. Becker Paribas Inc*. (9th Cir. 1986) 791 F.2d 691, 694.) Here, plaintiff has not demonstrated any prejudice from the defendant's delay or other conduct, so the court will not find a waiver of the right to arbitrate.

Next, plaintiff argues that the court should find that the agreement is unenforceable because it is unconscionable. However, plaintiff has failed to show that the agreement is both procedurally and substantively unconscionable.

"Unconscionability has both procedural and substantive elements. Although both must appear for a court to invalidate a contract or one of its individual terms, they need not be present in the same degree: '[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.'" (*Serpa v. California Surety Investigations, Inc*. (2013) 215 Cal.App.4th 695, 702-703, internal citations omitted.)

"Procedural unconscionability focuses on the elements of oppression and surprise. 'Oppression arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice.... Surprise involves the extent to which the terms of the bargain are hidden in a "prolix printed form" drafted by a party in a superior bargaining position.'" (*Id*. at 703, internal citations omitted.)

"Substantive unconscionability focuses on the actual terms of the agreement and evaluates whether they create an 'overly harsh' or '"one-sided" result', that is, whether contractual provisions reallocate risks in an objectively unreasonable or unexpected manner. Substantive unconscionability 'may take various forms,' but typically is found in the employment context when the arbitration agreement is 'one-sided' in favor of the employer without sufficient justification, for example, when 'the employee's claims against the employer, but not the employer's claims against the employee, are subject to arbitration.'" (*Ibid*, internal citations omitted.)

"'Substantive unconscionability' focuses on the terms of the agreement and whether those terms are 'so one-sided as to "shock the conscience."'" (*Kinney v.*

United HealthCare Services, Inc. (1999) 70 Cal.App.4th 1322, 1330, internal citations omitted.)

Here, plaintiff argues that the agreement is procedurally unconscionable because defendant failed to provide a copy of the AAA rules incorporated into the agreement at the time plaintiff signed it, and it was presented to plaintiff on a "take it or leave it" basis. However, contracts of adhesion in employment cases are not necessarily so procedurally unconscionable as to warrant refusing to enforce them. (*Roman, supra*, 172 Cal.App.4th at 1471.) Where the agreement is not buried in a lengthy document, and is clearly and succinctly labeled, the procedural unconscionability of an adhesive arbitration clause is limited. (*Ibid*.) Also, procedural unconscionability is not enough, by itself, to make the agreement unenforceable without some measure of substantive unconscionability. (*Ibid*.)

Here, the agreement was not buried in a lengthy document, and was submitted as a separate, clearly labeled, and succinctly worded two-page agreement. (Exhibit B to Petition.) In addition, as discussed further below, the plaintiff has not shown any substantive unconscionability, so the limited amount of procedural unconscionability resulting from the adhesive nature of the agreement is not enough, by itself, to warrant refusing to enforce it.

In addition, to the extent that plaintiff argues that the agreement was procedurally unconscionable because he was not given a copy of the AAA rules with the agreement, he has failed to show that this alleged defect made the agreement unconscionable.

"Agreements which incorporate the rules of a third-party organization without providing the employee with those rules at the time of signing can be procedurally unconscionable if the employee is not provided a copy of the rules upon signing the agreement. However, in those cases, the decisions seem to be based on the additional fact that the rules were not fair to the weaker party." (*Lucas v. Gund, Inc.* (C.D. Cal. 2006) 450 F.Supp.2d 1125, 1131, internal citations omitted.)

In *Lucas*, the federal court found that the failure to give plaintiff a copy of the AAA rules at the time she signed the agreement was not enough to show substantive unconscionability, because the AAA rules did not limit the remedies available to her, and there were no unfair provisions in the arbitration agreement that conflicted with the AAA rules. (*Ibid*.)

Likewise, here plaintiff has not demonstrated that the failure to provide him with the AAA rules resulted in any surprise to him, or caused him to give up any substantial rights. He has not shown that the AAA rules limit his available remedies, or that there were other provisions of the arbitration clause that were inconsistent with the AAA rules in such a way that it resulted in a loss of his rights. It appears that plaintiff's rights are in fact adequately protected under the agreement, since he still has the right to discovery, as well as the full remedies available under FEHA and other applicable law. (Exhibit B to Petition, p. 7-5.) Therefore, plaintiff has not shown that the failure to give him a copy of the AAA rules at the time he signed the agreement rendered the agreement unconscionable.

Next, with regard to substantive unconscionability, plaintiff argues that the agreement is unconscionable because defendant has treated the agreement as if it does not apply to it. Plaintiff alleges that defendant has "stalled" in consenting to arbitration in another case, and that defendant has refused to consent to allow the AAA to administer the case even though the agreement provides for the arbitration to follow AAA rules.

However, it is irrelevant whether defendant has consented to arbitration in a different case. The real issue is whether the agreement itself applies equally to both parties, not whether defendant has been slow to consent to arbitration in another case. The agreement's language clearly requires both parties to arbitrate any disputes arising out of the plaintiff's employment, so it is not one-sided on its face. In any event, defense counsel claims that any delay in consenting to arbitration in the other case was the result of the process of retaining counsel and obtaining the insurance company's consent to arbitration, not because the agreement itself is one-sided.

Also, to the extent that plaintiff argues that the defendant is refusing to allow the AAA to take jurisdiction over the case, this does not show substantive unconscionability. The agreement only provides that arbitration will be conducted under AAA rules, not that the AAA must be the organization that conducts the arbitration. (Exhibit B, p. 7-5.) Nor has plaintiff shown that defendant is refusing to apply the AAA rules to the case. While plaintiff claims that defendant is acting as if there are no rules, or that it can pick and choose which rules to follow, there is no evidentiary support for this claim. Instead, it appears that defendant is willing to apply AAA rules, but does not necessarily want to have the AAA administer the claim. Thus, plaintiff has not shown substantive unconscionability based on the defendant's alleged refusal to submit the matter to the AAA for arbitration.

Plaintiff has also argued that his rights are limited under the agreement, because the AAA rules provide one procedure for choosing arbitrators, but the agreement provides for a different procedure. Again, however, plaintiff has failed to show that this difference in the procedure for choosing an arbitrator has resulted in any unfairness to him. Regardless of whether the parties use the AAA rules or the arbitration procedure to choose the arbitrator, the parties will still have a neutral arbitrator hear the case, and plaintiff will have a say in picking the arbitrator. Therefore, plaintiff has failed to show that the agreement contains any substantive unconscionability. Consequently, the court intends to grant the petition to compel arbitration, and stay the pending action until the arbitration proceedings have been resolved.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 12/11/2013.
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***In Re: Analisa Escobar, a minor***
Superior Court Case No. 13CECG01766

Hearing Date: December 12, 2013 (**Dept. 402**)

Petition: Compromise Claim of the Minor

Tentative Ruling:

To grant the Amended Petition. The order has been signed and the hearing is off calendar.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 12/11/2013.
(Judge's initials) (Date)

Tentative Ruling

(24)

Re: ***GE Commercial Finance Business Property Corp. v. Certified Ad Services***
Court Case No. 12CECG00706

Hearing Date: **December 12, 2013 (Dept. 402)**

Motion: Receiver's Motion to Sell Receivership Property

Tentative Ruling:

To Grant, and sign the order presented. The hearing date originally scheduled for this motion, on January 9, 2014, is ordered off calendar.

Explanation:

There is no opposition to this motion, and in fact defendant has filed his consent to the sale of the property on the terms set forth in this motion. The sale is in the best interest of the receivership estate.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 12/11/2013.
(Judge's initials) (Date)

Tentative Rulings for Department 403

(6)

Tentative Ruling

Re: ***Kim v. LCN Ventures, LLC***
Superior Court Case No.: 12CECG02471

Hearing Date: December 12, 2013 (**Dept. 403**)

Motion: By Defendant L C N Ventures LLC for summary judgment

Tentative Ruling:

To grant. The prevailing party is directed to submit directly to this Court, within 5 days of service of the minute order, a proposed summary judgment order that complies with Code of Civil Procedure section 437c, subdivision (g), as well as a proposed judgment consistent with the summary judgment order. The trial and all related dates are taken off calendar.

The Court sets an order to show cause regarding default judgment review on January 30, 2014, at 10:05 a.m., in Dept. 401.

Explanation:

Defendant L C N Ventures LLC ("Defendant") has shown it is entitled to summary judgment in that it had no duty to Plaintiff Jin Kim ("Plaintiff"). (Code Civ. Proc., § 437c, subd. (p)(2).)

The undisputed facts demonstrate that Defendant did not retain control over Plaintiff's work. (*Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 211.) Plaintiff testified at deposition that he was not concerned about the lack of the safety cage or his own safety when accessing the roof (depos. of Jin Kim, pp. 21:6-21; 39:23-40:5), and he merely advised his subcontractors to be careful when accessing the ladder. He only told Defendant about the lack of a cage, to point out the difference from the building next door. (Depos. of Jin Kim, p. 21:6-16.)

No evidence submitted in the opposition establishes that Defendant retained control over Plaintiff's work or the safety of the project. Plaintiff acted as the project manager and oversaw everything on the project, hired the subcontractors, determined the course of the work to be performed and supervised and directed the work at the project and that Defendant never told Plaintiff what needed to be done on the project. (Depos. of Jin Kim, pp. 33:10-12, 32:9-33:9.) In order to have affirmatively contributed to Plaintiff's injuries, the defendant must have been actively involved in, or asserted control over, the manner of performance of the contracted work. (*Hooker v. Department of Transportation, supra,* 27 Cal.4th 198, 209.)

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 12/11/2013.
(Judge's initials) (Date)

(27) **Tentative Ruling**

Re: ***Nordbye v. Homeward Residential, INC. et al.***
Superior Court Case No. 13CECG02341

Hearing Date: **December 12, 2013 (Dept. 403)**

Motion: Defendant's Motion to Strike Portions of the Complaint; Request to take Judicial Notice; Defendant's Demurrer to the Complaint

Tentative Ruling:

To grant the request for judicial notice. To sustain the demurrer to all causes of action with leave to amend. To grant the motion to strike the punitive damage claims with leave to amend. The First amended complaint may be filed within 10 days of service of the order by the clerk. All new allegations in the first amended complaint are to be set in **boldface** type.

Explanation:

Judicial Notice

The court may take judicial notice of a recorded deed, or similar, document, but not, "the factual matters stated therein." (*Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117, citing *Kilroy v. State of California* (2004) 119 Cal.App.4th 140.) The court, therefore, can take judicial notice of the recordation, but not the substance therein, of the requested documents.

First COA: (Fraud)

There is a heightened pleading standard for fraud which requires " ' "pleading *facts* which "show how, when, where, to whom, and by what means the representations were tendered." ' " (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.) In *West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, the court found the plaintiff satisfied the particularity requirement where the correspondences which contained the alleged misrepresentations were attached as exhibits to the complaint. (*Id*. at 793.) The court also found sufficient where allegedly fraudulent adjustable rate mortgage instruments were attached to the operative pleading. (*Boschama v. Home Loan Center, Inc*. (2011) 198 Cal.App.4th 230, 248.)

In the present case, the plaintiffs' claims center around two events: First, that defendant Ocwen has not or will not accept the loan modification as proposed by defendant Homeward. To this end, the proposal by defendant Homeward is attached as Exhibit "C" to the complaint. Lacking, however, is any specific correspondence or detailed communication by or with defendant Ocwen stating their disallowance of the loan modification. Secondly, although the plaintiffs' claim their loan is in default, they neither attached a correspondence nor a recorded document indicating the default status. Under *West* and *Boschama*, attachment of such documents satisfies the heightened pleading burden for a fraud cause of action. Unlike *West* and *Boschama*, however, the Plaintiffs' did not attach the exact documents which support their claims to the operative pleading. The demurrer is sustained with leave to amend.

Second, Third and Fourth COA:

The function of a demurrer is to test the sufficiency of a plaintiff's pleading by raising questions of law. (*Plumlee v Poag* (1984) 150 Cal.App.3d 541, 545) The test is whether plaintiff has succeeded in stating a cause of action; the court does not concern itself with the issue of plaintiff's possible difficulty or inability in proving the allegations of his complaint. (*Highlanders, Inc. v. Olsan* (1978) 77 Cal.App.3d 690, 697.)

Based in breach of contract, Plaintiffs' second, third and fourth causes of action necessarily require establishment of breach. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821; *Barroso v. Ocwen Loan Servicing, LLP* (2012) 208 Cal.App.4th 1001, 1016; *Thrifty Payless, Inc. v. Americana at Brand, LLC* (2013) 218 Cal.App.4th 1230, 1244.) Here, Plaintiffs' reference "OCWEN's failure to honor their modification" in the complaint. (Complaint, pg. 6, ln. 7.) However, Plaintiffs' do not specifically allege that defendant Ocwen refused to extend the loan modification initiated by defendant Homeward. Therefore, there is no specific allegation that a breach actually occurred. The demurrer to these three causes of action is sustained with leave to amend.

Fifth COA (Unfair Business Practices)

"The use of the phrase 'business practice' in section 17200 indicates that the statute is directed at ongoing wrongful conduct." *Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal.App.4th 499, 519, 63.) "[T]he 'practice' requirement envisions something more than a single transaction . . .; it contemplates a 'pattern of conduct' [citation], 'on-going . . . conduct' [citation], 'a pattern of behavior'[citation], or ' course of conduct.'. . ." (*State of California ex rel. Van de Kamp v. Texaco, Inc*. (1988) 46 Cal.3d 1147, 1169-1170.) "A plaintiff alleging unfair business practices under these statutes [UCL] must state with reasonable particularity the facts supporting the statutory elements of the violation." (*Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 619.)

Similar to the fraud cause of action, here Plaintiffs' have neither provided correspondence nor a recorded document indicating that they are actually categorized as defaulting on the loan. The notice of default attached as exhibit B is from 2010 and was later rescinded. Consequently, there is no evidence of an ongoing unfair practice. The demurrer is sustained with leave to amend.

Motion to Strike the Punitive Damages Claim

Pleading punitive damages requires pleading specific facts supporting a finding of malice, oppression or fraud. (*Smith v. Superior Court* (1992) 10 Cal.App.4th 1033, 1041.) Generalized conclusions do not suffice. (*Id*.) The motion to strike is granted. Leave to amend is granted.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 12/11/2013.
(Judge's initials) (Date)

Tentative Rulings for Department 501

(20) **Tentative Ruling**

Re: ***Nolte v. Nolte Sheet Metal, Inc., et al.***, Superior Court Case No. 13CECG01860

Hearing Date: **December 12, 2013 (Dept. 501)**

Motion: Motion to Compel Further Discovery Responses

Tentative Ruling:

To grant the motion to compel further responses to Request for Production of Documents Nos. 1-6, 9-12, 15-17, 20-23, 26-29, 32-47, Form Interrogatories, Nos. 2.5, 8.2, 8.3, 8.4, 8.6, 8.7, 8.8, Special Interrogatories Nos. 27-36, 39-42, and Request for Admissions Nos. 21-26. (Code Civ. Proc. §§ 2030.300(a)(1), 2031.320(a), 2033.290(a)(1).) Plaintiff shall serve further responses and produce all responsive documents within 30 days of service of the order by the clerk.

To impose $1,560 in monetary sanctions against plaintiff and in favor of defendant Edmund Nolte Jr., to be paid within 30 days of service of the order by the clerk. (Civ. Proc. §§ 2030.300(d), 2031.320(b), 2033.290(d).)

Explanation:

Requests for Production of Documents

In response to the production demands, plaintiff responded that "[a]ny documents I currently have in my possession I can produce, however they are in various locations and I believe Nolte Sheet Metal has most of these documents."

However, as of the filing of the motion to compel plaintiff had not produced any responsive documents. (Noyes Dec. ¶ 9.)

Plaintiff must be compelled to produce any responsive documents in his possession, custody or control.

> A statement that the party to whom a demand for inspection, copying, testing, or sampling has been directed will comply with the particular demand shall state that the production, inspection, copying, testing, or sampling, and related activity demanded, will be allowed either in whole or in part, and that all documents or things in the demanded category that are in the possession, custody, or control of that party and to which no objection is being made will be included in the production.

(Code Civ. Proc. § 2031.220.)

As plaintiff alleges that he is employed by Nolte Sheet Metal, Inc. ("NSMI"), he should be able to acquire those records.

> A representation of inability to comply with the particular demand for inspection, copying, testing, or sampling shall affirm that a diligent search and a reasonable inquiry has been made in an effort to comply with that

> demand. This statement shall also specify whether the inability to comply is because the particular item or category has never existed, has been destroyed, has been lost, misplaced, or stolen, or has never been, or is no longer, in the possession, custody, or control of the responding party. The statement shall set forth the name and address of any natural person or organization known or believed by that party to have possession, custody, or control of that item or category of item.

(Code Civ. Proc. § 2031.230.)

If plaintiff intended this response to represent an inability to comply, as opposed to a statement of compliance, the responses must be more clear. The statement that NSMI has most of the documents is insufficient. That another party also has possession of or access to the documents is not a ground for failing to produce documents.

While plaintiff has since produced his W2 statements, those are not all of the responsive documents. Plaintiff must produce what he has or has access to. If plaintiff does not have possession of responsive documents and has been prevented from accessing them, then he needs to provide a more definite response in compliance with Code Civ. Proc. § 2031.220. If after making reasonable inquiries and efforts to get the documents, plaintiff may serve a verified response statement stating that he cannot comply because the documents are not in his possession, custody or control.

Form Interrogatories

Plaintiff simply fails to provide any of the information requested by interrogatory 2.5, 8.4, 8.6. In response to interrogatories 8.2, 8.3, 8.7, 8.8, plaintiff does not provide the information, but says he'll get the information later.

Interrogatory responses must include all information "reasonably available" to a party, including information available by "inquiry to other natural persons or organizations." (Code Civ. Proc. § 2030.220(a), (c).) It is not sufficient for plaintiff to state that he will get the information later. "If only partial answers can be supplied, the answers should reveal all information then available to the party. If a person cannot furnish details, he should set forth the efforts made to secure the information. He cannot plead ignorance to information which can be obtained from sources under his control." (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 782.)

The motion should be granted as to all form interrogatories.

Special Interrogatories

Interrogatories 27-36 are contention interrogatories asking about plaintiff's allegation at ¶ 4 of the complaint that Edmund should be held liable for "any and every wrong" by NSMI. The interrogatories repeat phrase, and plaintiff objects that the interrogatories are confusing as to the term "every wrong". He says he is not sure what this refers to and objects that it is vague and ambiguous.

Vague and ambiguous objections are usually not sustained unless the question is totally unintelligible. (*Deyo, supra*, 84 Cal.App.3d at 783.) Since this is plaintiff's own wording, he cannot object that it is vague and ambiguous.

Interrogatory 39-42 are contention interrogatories asking if plaintiff contends that NSMI is the alter-ego of Edmund. Plaintiff objects that this calls for a legal conclusion.

Interrogatories may be used to require a party to state his or her contentions as to either factual or legal issues. (Code Civ. Proc. § 2030.010(b).)

Accordingly, plaintiff's objections are overruled, and responsive answers must be provided.

Request for Admissions

Requests 21-26 ask plaintiff to admit that Ernest was NSMI's President (21), Ernest made all of NSMI's corporate business decisions (22), Edmund was not responsible for NSMI's employee payroll (23) or human resources department (24), Ernest was responsible for NSMI's payroll (25) and human resources department (26). To each plaintiff responded, "Unknown and cannot admit or deny on that basis."

Code Civ. Proc. § 2033.220 provides:

> (a) Each answer in a response to requests for admission shall be as complete and straightforward as the information reasonably available to the responding party permits.
> (b) Each answer shall:
> (1) Admit so much of the matter involved in the request as is true, either as expressed in the request itself or as reasonably and clearly qualified by the responding party.
> (2) Deny so much of the matter involved in the request as is untrue.
> (3) Specify so much of the matter involved in the request as to the truth of which the responding party lacks sufficient information or knowledge.
> (c) If a responding party gives lack of information or knowledge as a reason for a failure to admit all or part of a request for admission, that party shall state in the answer that a reasonable inquiry concerning the matter in the particular request has been made, and that the information known or readily obtainable is insufficient to enable that party to admit the matter.

On this record the court cannot make a determination as to whether plaintiff has definite knowledge of these matters as moving party contends. But plaintiff's responses, claiming lack of knowledge, are insufficient and fail to comply with section 2033.220(c). There is no indication that he has made any inquiry. He must provide further responses.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: M.B. Smith on 12/10/13.
(Judge's initials) (Date)

Tentative Rulings for Department 503

(5)

Tentative Ruling

Re: ***Deutsche Bank National Trust Co. v. Pessar***
Superior Court Case No. 10CECG04213

Hearing Date: December 12, 2013 **(Dept. 503)**

Request: Enter Default Judgment

Tentative Ruling:

To order the matter off calendar for failure to comply with Local Rule 2.1.14. In the event that the Plaintiff wishes to proceed via oral testimony alone, compliance with CRC Rule 3.1306(b) is required. Denied without prejudice.

Explanation:

According to the pleadings, on or about September 9, **2006**, Defendant Pessar executed a promissory note in the amount of $376,644 in favor of Plaintiff's assignor, New Century secured by a Deed of Trust on property located at 29 West Powers Avenue, Clovis, CA [the property]. In addition, Pessar also executed a promissory note in the amount of $94,161 in favor of New Century secured by a second Deed of Trust upon the property. Plaintiff alleges that after escrow closed, the First Deed of Trust was inadvertently and/or erroneously not recorded. New Century has been unable to locate the original Deed of Trust. Plaintiff further alleges that Pessar is currently in default under the note. See ¶¶ 6, 9-13. It is further alleged that although Pessar was requested to execute a duplicate original of the First Deed of Trust, he refused to do so. Id. at ¶ 14.

On November 23, **2010**, Plaintiff filed a verified complaint seeking to establish a Deed of Trust, establish an equitable lien or mortgage and declaratory relief. Default was entered against the Defendant on September 29, 2011. On August 8, 2012 an order was entered denying the request for default judgment on a number of grounds but permitting the Plaintiff to file a First Amended Complaint. This pleading was filed over 5 months later on January 18, 2013. It now alleges five causes of action:

1. Establish Deed of Trust;
2. Establish Equitable Lien or Mortgage;
3. Declaratory Relief;
4. Compel Re-Execution of the First Deed of Trust;
5. Restoration of the Lost Instrument pursuant to Civil Code § 3415.

Importantly, Plaintiff now alleges that "Doe 1 obtained an assignment of the loan secured by the New Century Second Deed of Trust." See ¶ 15 of the First Amended Complaint.

The First Amended Complaint was personally served on February 4, 2013. Default was entered on March 7, 2013. On August 13, 2013, Plaintiff filed a request for court judgment. The hearing was originally set for October 10, 2013 but was continued at the request of the Plaintiff to December 12, 2013. Notably, Plaintiff did not submit any declarations or a Memorandum of Points and Authorities in support of the hearing.

Plaintiff may argue that the Memorandum of Points and Authorities filed on March 28, 2012 in support of the initial request for judgment still applies. But, this Memorandum cites to *Bank of Suisun v. Fiske* (1924) 65 Cal.App.771 and *McColgan v. Bank of California National Association* (1929) 208 Cal. 329. But, in *Bank of Suisun*, supra, the case involved the right to a surplus after foreclosure. Id. at 772. In *McColgan, supra*, the action was to quiet title. Also, these cases are very old. The law of foreclosure has changed significantly since the 1920s. Notably, neither case is authority for "reforming the public record to show that the Deed of Trust was recorded on January 17, 2007" or "compelling Pessar to re-execute the First Deed of Trust" or to "compel the issuance, execution and acknowledgment of a duplicate First Deed of Trust" that would have priority over the Second Deed of Trust. See Prayer of the First Amended Complaint at pages 9-11. Apparently, the Plaintiff is aware that the Second Deed of Trust has been assigned. Proceeding without the presence of Doe 1 appears to be a violation of due process. Therefore, the request for the entry of default judgment will be denied without prejudice.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 12/11/2013.
(Judge's initials) (Date)